

No. 20982

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

DAVID ERLICH,

Appellant.

vs.

JUDA GLASNER, CHAIM I. ETNER, BEZLIAL ORLANSKI,
NEPTALI FRIEDMAN, OSHER ZILBERSTEIN; JUDA
GLASNER, OSHER ZILBERSTEIN and CHAIM I. ETNER,
doing business as the UNITED ORTHODOX RABBINATE
OF GREATER LOS ANGELES, UNITED ORTHODOX RAB-
BINATE OF GREATER LOS ANGELES, A. M. BAUMAN
and JACOB ADLER,

Appellees.

APPELLANT'S OPENING BRIEF.

FILED

JOSEPH W. FAIRFIELD and
ETHELYN F. BLACK,

AUG 17 1966

8500 Wilshire Boulevard,
Beverly Hills, Calif. 90211,

WM. B. LUCK, CLERK

Attorneys for Appellant.

NOV 4 1966

TOPICAL INDEX

| | Page |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Preliminary statement | 1 |
| Statement as to jurisdiction | 1 |
| Statement as to the facts | 2 |
| Questions for the court | 6 |
| Appellant's argument | 7 |
| Point I. | |
| Regarding the question of immunity | 8 |
| Point II. | |
| Regarding the deprivation of plaintiff's constitutional rights under the Fourteenth Amendment | 10 |
| A. Regarding the injury to the plaintiff as a shareholder of West Coast Poultry Company, a California corporation | 11 |
| B. The interference by the defendants with the plaintiff's right to earn a living for himself and his family is a violation of plaintiff's rights under the Fourteenth Amendment | 14 |
| C. Regarding the allegations in the amended complaint | 20 |
| Point III. | |
| Regarding pleading conclusions of law in the amended complaint | 21 |
| Point IV. | |
| Conclusion | 22 |
| Appendix. Pertinent portions of the statutes | App. p. 1 |

TABLE OF AUTHORITIES CITED

| Cases | Page |
|--------------------------------------------------------------------------------------|--------|
| Agnew v. Moody, 330 F. 2d 868 | 9 |
| Burke v. Badlam, 57 Cal. 594 | 12 |
| Carbo v. United States, 314 F. 2d 718 | 16 |
| Cohen v. Norris, 300 F. 2d 24 | 8, 10 |
| Conly v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 | 22 |
| Cooper v. Pate, 378 U.S. 546, 84 S. Ct. 1733, 12 L. Ed. 1030 | 21 |
| DeMille v. American Federation of Radio Artists, 31 Cal. 2d 139, 187 P. 2d 769 | 14 |
| Dent. v. State of West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 | 17 |
| Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924, 54 N.E. 524, 43 L.R.A. 797 | 16 |
| Erlich v. Glasner, 352 F. 2d 119 | 1, 2 |
| Erlich v. Municipal Court, 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334 | 16, 20 |
| Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 | 19 |
| Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 | 11 |
| Hoffman v. Halden, 268 F. 2d 280 | 10 |
| Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S. Ct. 141, 69 L. Ed. 402 | 16 |
| Kirkland v. Levin, 63 Cal. App. 589, 219 Pac 455 .. | 12 |
| Louis K. Liggett Co. v. Baldrige, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 | 11 |

| | Page |
|----------------------------------------------------------------------------------------------|-----------|
| Lucero v. Donovan, 354 F. 2d 16 | 21 |
| Meyer v. State of Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 | 18, 19 |
| Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 | 8, 10, 15 |
| Nelson v. Knox, 256 F. 2d 312 | 8 |
| Parker v. Lester, 227 F. 2d 708 | 17 |
| Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475 | 12 |
| Robichaud v. Ronan, 351 F. 2d 533 | 9 |
| Robinson v. Lull, 145 Fed. Supp. 134 | 16 |
| Royal News v. Schultz, 350 F. 2d 302 | 20 |
| Royal News Company v. Schultz, 230 Fed. Supp. 641 | 20 |
| Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 | 16 |
| Sutter v. General Petroleum Corp., 28 Cal. 2d 525, 170 P. 2d 898 | 12 |
| Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 | 19 |
| Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 54 | 15 |
| Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 | 18, 19 |
| Van Zandt v. McKee, 202 Fed. Rep. 2d 490 | 14 |
| Wallace v. Ford, 21 Fed. Supp. 624 | 15 |

| | Statutes | Page |
|----------------------------------------------------------------|--------------|------|
| Penal Code, Sec. 383b | 2, 3, 4, 16 | |
| United States Code Annotated, Title 18, Sec. 241 .. | 16 | |
| United States Code Annotated, Title 18, Sec. 1951 | 16 | |
| United States Code Annotated, Title 28, Sec. 1343 | 1 | |
| United States Code Annotated, Title 42, Sec. 1983 | 1, 10, 11 | |
| United States Constitution, Fifth Amendment | 14, 19 | |
| United States Constitution, Fourteenth Amendment | 15, 19, 20 | |
| United States Constitution, Fourteenth Amendment, Sec. 1 | 6, 7, 11, 12 | |

No. 20982

IN THE

United States Court of Appeals FOR THE NINTH CIRCUIT

DAVID ERLICH,

Appellant.

vs.

JUDA GLASNER, CHAIM I. ETNER, BEZLIAL ORLANSKI,
NEPTALI FRIEDMAN, OSHER ZILBERSTEIN; JUDA
GLASNER, OSHER ZILBERSTEIN and CHAIM I. ETNER,
doing business as the UNITED ORTHODOX RABBINATE
OF GREATER LOS ANGELES, UNITED ORTHODOX RAB-
BINATE OF GREATER LOS ANGELES, A. M. BAUMAN
and JACOB ADLER,

Appellees.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

This is an appeal by the plaintiff [Tr. p. 41] from a judgment dismissing his cause of action [Tr. p. 36]. This matter was before this court once before, also from a judgment entered on an order dismissing the cause of action because of failure to state a claim (*Erlich v. Glasner*, 9th Cir. 1965, 352 F. 2d 119).

Statement as to Jurisdiction.

This is an action under the Civil Rights Act (42 U.S.C.A. 1983, *et seq.*). Jurisdiction lies in the Federal Court pursuant to 28 U.S.C.A. 1343.

Statement as to the Facts.

The amended complaint in this cause was dismissed on defendants' motions for failing to state a claim [Tr. pp. 8, 15, 29]. The facts are all contained in the amended complaint [Tr. p. 2] and are the same as set forth in Appellant's Opening Brief in appeal 19872, and as stated in the opinion of *Erlich v. Glasner*, 9th Cir., 1965, 352 F. 2d 119, 120-121.

David Erlich is engaged in the process of slaughtering and processing kosher poultry, which he distributes wholesale and retail to the Jewish populace in Los Angeles and neighboring counties. For 13 years he operated as an individual under the fictitious name of West Coast Poultry Company [Complaint, Par. II, Tr. p. 3]. In August of 1960 he formed a corporation known as the West Coast Poultry Company which continued the same business at the same address. Plaintiff and his wife own all of the outstanding shares of stock in this corporation and the appellant is the president and general manager thereof. [Complaint, Par. III, Tr. p. 3].

The defendant Juda Glasner is a civil service employee employed by the Department of Health of the State of California as Kosher Food Law Representative charged with the enforcement of California Penal Code §383b. [Complaint, Par. V, Tr. p. 3]. He and the defendants Chaim I. Etner and Osher Zilberstein are also engaged in business under the fictitious name of United Orthodox Rabbinate of Greater Los Angeles [Complaint, Par. IV, Tr. p. 3]. Defendants Juda Glasner, Chaim Etner and Osher Zilberstein as alleged orthodox Rabbis contend that they, and only they, are empowered and have full and complete authority to dic-

tate what is and what is not kosher. [Complaint, Par. VI, Tr. p. 3]. Thus they have created themselves as the sole hierarchy to supervise kashruth. To enforce their dictatorship and compel the kosher poultry dealers of Southern California to retain their rabbinical services, the defendants use the police enforcement position of defendant Glasner, California Kosher Food Law Representative, and with threats of criminal prosecution coerce the poultry dealers of Southern California to retain their rabbinical services [Complaint, Par. VII, Tr. p. 4].

To compel the plaintiff in this cause to retain the rabbinical services of the United Orthodox Rabbinate of Greater Los Angeles, the defendant Juda Glasner in his capacity as Kosher Food Law Representative but not within his duties as kosher food law representative, filed two criminal complaints against the plaintiff, falsely accusing him of violating California Penal Code §383b [Complaint, Par. VIII (b); Tr. p. 4].

In the second criminal complaint in which the defendant Glasner was the complaining witness, Sam Salter and John Reyna, former employees of the plaintiff were offered payment to falsely testify under oath that the plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements [Complaint, Par. VIII (d); Tr. p. 4].

When prosecution of the plaintiff under California Penal Code §383b was unsuccessful, the defendants pursuant to their conspiracy to compel plaintiff to retain the rabbinical services of the defendant, United Orthodox Rabbinate of Greater Los Angeles, again with Glasner as the complaining witness, but not within his duties as kosher food law representative, filed a series

of criminal complaints against Sidney Abramovitz, David Glickman, Bezliaj Orlanski and Neptali Friedman, employees of the plaintiff, falsely charging them with violating California Penal Code §383b, so that they left the employ of the plaintiff [Complaint, Par. VIII (d) to (h); Tr. pp. 4-5].

Still in pursuance of their policy of coercion, the defendants communicated with the customers of the plaintiff and warned them that if they purchased kosher poultry from the plaintiff they would be charged by the defendant Glasner with a violation of California Penal Code §383(b) [Complaint, Par. VIII (a); Tr. p. 4], and to show that they meant business, the defendants in conformance with their conspiracy, entered into a champertous agreement with competitors of the plaintiff, who commenced an action in the Superior Court of the State of California, being L. A. Superior Court action No. 825,740 for an injunction to restrain plaintiff from selling poultry unless it was done under the supervision of these defendants [Complaint, Par. VIII (i); Tr. p. 5]. Furthermore, by means of advertising, these defendants cautioned the public of Southern California not to purchase any of plaintiff's kosher products [Complaint, Par. VIII (b), Tr. p. 4].

Following the reversal of the former appeal, a hearing was had on the spreading of the mandate at which particular time the trial court suggested that plaintiff amend Paragraphs VII and VIII of his complaint by alleging that the conduct of the defendant Glasner was not within the course of his duties. The trial court stated, that without deciding any of the issues in the cause, it was of the opinion that no right could exist against any of the defendants if Glasner was merely performing his duties.

Thereupon an amended complaint was filed in which it was alleged in paragraphs VII and VIII that the conduct of the defendant Glasner was: "not within the course of his duties as Kosher Food Law representative." [Tr. p. 4]. Plaintiff further amended his complaint by adding to paragraph IX, allegations that the interference by the defendants with the business of the West Coast Poultry Company was a direct interference with plaintiff's right to peacefully operate his business and earn a livelihood for himself and his family; all in violation of the privileges and immunities guaranteed to him as a citizen of the United States by Section 1 of Amendment XIV of the Constitution of the United States.

Plaintiff in his amended complaint added paragraph X requesting punitive damages [Tr. p. 6].

Following the service and filing of the amended complaint, the defendants again moved the court to dismiss the amended complaint and the action on the ground that the amended complaint failed to state a claim against the defendants upon which relief could be granted [Tr. pp. 8, 15 and 29]. The court granted the motion [Tr. p. 40] and entered a judgment of dismissal stating in substance as follows [Tr. pp. 35-37]:

1. That the Real Party in Interest was not the plaintiff, but the corporation West Coast Poultry Company which would suffer the damages alleged in the amended complaint and that a corporation has no cause of action under the Civil Rights Law.
2. That all of the acts alleged to have been committed by the defendant Glasner were:

- a. Committed by him with the course and scope of his employment as a duly qualified, appointed and act-

ing official of the Department of Health of the State of California being a kosher food law inspector thereof,

- b. that the acts charged by him in the amended complaint were discretionary acts, and
- c. He is protected from suit by immunity by the laws of the State of California.

3. That the allegations contained in paragraph VIII of the amended complaint to the effect that defendants entered into an unlawful combination and conspiracy for the purpose of depriving the plaintiff of the privileges and immunities guaranteed to him as a citizen of the United States by Section 1 of the 14th Amendment were mere conclusions of law unsupported by any proper and sufficient allegations of fact in the amended complaint.

The appeal from this judgment thereupon followed.

Questions for the Court.

The only question before this court is:

Does the amended complaint state facts sufficient to constitute a claim; or if defective, can it be amended to state one, for if the amended complaint can be further amended it is error to enter a judgment of dismissal without first giving the plaintiff the opportunity to mend.

APPELLANT'S ARGUMENT.

The appellant contends on this appeal as follows:

1. a. That the immunity laws of a state do not protect a public official (Judges, Prosecutors and Legislators excepted) from an action in the federal court for violation of the Civil Rights law.
b. That in an action under the Civil Rights Act it would make no difference whether the public official (Judges, Legislators and Prosecutors excepted) was or was not acting within the scope of his duties; and it would make no difference whether the public official's acts were discretionary or ministerial.
2. That plaintiff's right to earn a livelihood for himself and his family and his right to hold property are privileges and immunities guaranteed to him by Section 1, Article XIV of the United States Constitution. If the defendants under color of law violated these guarantees of plaintiff, it would make no difference whether it was done to him directly or through a corporation wholly owned by himself and his wife.
3. a. That the allegations of an unlawful combination and conspiracy set forth in paragraph VIII of the amended complaint, subdivisions (a) through (i) inclusive contain sufficient allegations of facts of overt acts [Tr. pp. 4-5] to establish the unlawful combination and conspiracy.
b. Pleading conclusions of law is not grounds for dismissing a pleading without leave to amend.

POINT I.

Regarding the Question of Immunity.

It is now well established that a public official (Judges, Prosecutors and Legislators excepted) have no immunity under the state law in an action brought under the Civil Rights Act. The leading case on this point is *Monroe v. Pape* (1961), 365 U.S. 167 (81 S. Ct. 473, 5 L. Ed. 2d 492.).

In *Cohen v. Norris* (9th Cir., 1962), 300 F. 2d 24, the same defense of immunity was also interposed. In rejecting this contention on the basis of *Monroe v. Pape* the Court stated on page 33:

“Monroe v. Pape involved police officers and, while the opinion of the court does not specifically discuss immunity, the result reached necessarily implies rejection of such a defense as a general proposition. As appellees concede, they would not be immune from liability had an action been brought against them in the courts of California for false arrest and imprisonment. See *Miller v. Glass*, 44 Cal. 2d 359, 282 P. 2d 501. But, in any event, no local rule of immunity unassociated with a generally recognized common-law immunity can stand as a defense in a Civil Rights Acts case.”

Probably the best expression that state immunity is not applicable to a violation of the Civil Rights Law is contained in *Nelson v. Knox* (U.S.C.A. 6th, 1958), 256 F. 2d 312, 314:

“We hold at the outset that the extent of the defendant’s insulation from liability under the Civil Rights Act cannot properly be determined by reference to the local rule in Michigan. Surely each

state cannot be left to decide for itself which of its officials are completely immune from liability for depriving a citizen of rights granted by the federal constitution. The question must be decided as a matter of general law."

Moreover, the defense of immunity from prosecution heretofore available to Judges, Prosecutors and Legislators (*Agnew v. Moody* (9th Cir., 1964), 330 F. 2d 868), is no longer applicable as a defense when the offender acts in some capacity other than in the position which grants him the immunity. Such a situation presented itself in *Robichaud v. Ronan* (9th Cir. 1965), 351 F. 2d 533, where the plaintiff brought an action under the Civil Rights Act against the county attorney and the deputy county attorney from Maricopa County, Arizona. The defendants pleaded that they were immune from liability for acts committed in the performance of their official duties, and the trial court dismissed the complaint. In reversing, the appellate court stated on page 536:

"We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity —integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and Laws? (citations.) To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

And the Court further stated on pages 537-538:

“The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process.”

Defendant Glasner in arguing immunity relies upon *Hoffman v. Halden* (9th Cir., 1959), 268 F. 2d 280 [Tr. pp. 31-32]. However, *Cohen v. Norris*, *supra*, expressly overruled *Hoffman v. Halden* and held that in view of *Monroe v. Pape*, police officers even in the exercise of discretionary functions are liable in an action under the Civil Rights law (*Cohen v. Norris*, *supra*, on pages 29-20).

It is therefore respectfully submitted that as a matter of law, the doctrine of immunity as a defense is not applicable to this cause.

POINT II.

Regarding the Deprivation of Plaintiff's Constitutional Rights Under the Fourteenth Amendment.

In entering judgment for the defendants the court determined that the real party in interest was not the plaintiff but the West Coast Poultry Company, a California corporation; and that from the allegations in the amended complaint it was the corporation, that suffered injuries and not the plaintiff, and that a corporation has no cause of action under 42 U.S.C.A. 1983, or any other federal statute for alleged violation of its Civil Rights [Tr. pp. 35-36].

It is respectfully submitted that this conclusion is error for three reasons:

- a. That since Erlich is a dominant shareholder in the corporation, an attack upon the corporation is an injury to plaintiff's property consisting of his ownership of shares in the corporation.
- b. Under the privileges and immunities section of Section 1, Article XIV of the United States Constitution, Erlich is guaranteed this right to pursue a lawful occupation and earn a living for himself and his family.
- c. That several of the overt acts alleged in paragraph VIII of the amended complaint, are directed against the plaintiff personally, and not against the corporation [Tr. p. 5].

A. Regarding the Injury to the Plaintiff as a Shareholder of West Coast Poultry Company, a California Corporation.

While it is true that Section 1983 permits relief only to natural persons because only natural persons and not artificial persons are citizens of the United States entitled to the privileges and immunities under Section 1 of the XIV Amendment (*Hague v. C.I.O.* (1939), 307 U.S. 496, 514, 59 S. Ct. 954, 83 L. Ed. 1423), nevertheless "a corporation is a 'person' within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. . . ." (*Louis K. Liggett Co. v. Baldridge* (1928), 278 U.S. 105, 111 [49 S. Ct. 57, 58, 73 L. Ed. 204]).

A person's business, whether corporate or individual is also a property right (*Louis K. Liggett Co. v. Baldridge, supra.*)

In California shares of stock are personal property (*Kirkland v. Levin* (1923), 63 Cal. App. 589, 590 [219 Pac. 455]), and although the owner of shares is not the owner of the corporate assets, he has a right to share in the corporate earnings and assets after dissolution (*Rhode Island Hospital Trust Co. v. Doughton* (1925), 270 U.S. 69, 81 [46 S. Ct. 256, 258] 70 L. Ed. 475). Since the value of shares is determined by the corporation's assets and earnings, any impairment of the corporation's property or its earning power reduces the value of the stock and proportionally diminishes the value of the shareholder's property (*Burke v. Badlam* (1881), 57 Cal. 594, 601).

Plaintiff and his wife own all of the outstanding shares of stock in West Coast Poultry Company [Amended Complaint, par. III, Tr. p. 33]. The conduct of the defendants as alleged in the amended complaint was in violation of the privileges and immunities of the plaintiff to own property as guaranteed to him by Section 1, Article XIV, of the United States Constitution.

Moreover, a cause of action may exist in favor of both the corporation and the stockholder.

In *Sutter v. General Petroleum Corp.* (1946), 28 Cal. 2d 525, 170 P. 2d 898, plaintiff commenced an action for fraud. The plaintiff contended that by fraudulent representations and promises he was induced to participate in the organization and financing of a corporation. The trial court dismissed the cause of action on the grounds that the injuries complained of were done to the corporation and not the plaintiff as a shareholder and that since the cause of action was not derivative or representative in which the shareholders would sue

in behalf of the corporation, no cause of action was stated.

In reversing the Supreme Court of the State of California said as follows on page 530:

“Generally a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. (citations.) But ‘If the injury is one to the plaintiff as a stockholder and to him individually and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action. . . . The action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.’ (citations.) And a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong. (Citations.)”

And again on page 531:

“In that fashion the defect in the island and the failure to perform the promises injured the Devel-

opment Company and Rincon Company but there was also a direct individual injury to plaintiff Sutter, and, as we have seen, the dual nature of the injury does not necessarily preclude an action by the stockholder as an individual. Defendants, by their promises and representations induced plaintiff to form the corporation and invest his money therein, and then breached their duty of honest dealing with him. By way of damages plaintiff Sutter asserts that because of the false representations he invested \$33,440 in the venture and the Rincon Company, and that as the result of the fraud of defendants the stock in the Rincon Company became valueless.

“While ordinarily a stockholder may not sue individually for impairment of a corporation’s assets rendering the stock worthless, yet here that result is merely one method of ascertaining the amount of damages suffered by Sutter. He lost his investment which was represented by the stock, and its reduction in value would be the extent of his loss. The damages all flowed from the tort of the defendants.”

B. The Interference by the Defendants With the Plaintiff’s Right to Earn a Living for Himself and His Family Is a Violation of Plaintiff’s Rights Under the Fourteenth Amendment.

The right to earn a living is a property right guaranteed to the plaintiff under the due process clause of the Fifth Amendment to the Federal Constitution (*De Mille v. American Federation of Radio Artists* (1947), 31 Cal. 2d 139, 153 [187 P. 2d 769]; *Van Zandt v. McKee* (5th Cir., 1953), 202 Fed. Rep. 2d 490, 491)

and also under the due process clause of the Fourteenth Amendment to the Federal Constitution (*Truax v. Corrigan* (1921), 257 U.S. 312, 327 [42 S. Ct. 124, 127; 66 L. Ed. 54]; *Wallace v. Ford* [D. C. Texas, 1937], 21 F. Supp. 624, 628).

Truax v. Corrigan, supra, involved the question of a right to picket. The court stated on page 327:

“Plaintiff’s business is a property right (citation), and free access for employees, owner, and customers to his place of business is incident to such right. Intentional injury caused to either or both by a conspiracy is a tort. Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful.”

It is undisputed that the defendants and each of them are interfering with the plaintiff’s right to earn a living by attempting to compel him to join and operate his business only pursuant to their rabbinical organization. It is also undisputed that the defendant Glasner, the Kosher Food Law Representative, is using his official position as an employee of the State of California, under color of law, to coerce plaintiff to join. Unquestionably the defendants were operating under color of law. There is no difference between the facts stated in *Monroe v. Pape* (1961), 365 U.S. 167 [81 S. Ct. 473, 5 L. Ed. 2d 492] where police officers of the City of Chicago broke into the petitioners home in the early morning, got them out of bed, made them stand naked in the living room, opening drawers, ripping mattress covers, and then taking them to the police station and detaining them on open charges for about 10 hours with the facts in the present cause that the defendant Glasner pursuant to the conspiracy filed unmeritorious

complaints, charging the plaintiff with the violation of California Penal Code §383b; and in the second complaint attempted to compensate two former employees of the plaintiff to testify falsely as to alleged transgression. If there is a difference, it can only be one of degree.

In selling his product to the public as kosher, Erlich is only required to exercise his judgment in good faith that the product is in fact kosher (*Hygrade Provision Co. v. Sherman* (1925), 266 U.S. 497 [45 S. Ct. 141] 69 L. Ed. 402; *Erlich v. Municipal Court* (1961), 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334).

The defendants should not be permitted to compel plaintiff to do more. Their persistence in so doing is a direct violation of the Hobbs Act (18 U.S.C.A. 1951) the essential elements of which are interference with commerce and extortion (*Stirone v. United States* (1960), 361 U.S. 212, 218 [80 S. Ct. 270, 274; 4 L. Ed. 2d 252]). It is also in violation of plaintiff's guaranteed civil rights (18 U.S.C.A. 241).

In *Carbo v. United States* (9th Cir., 1963), 314 F. 2d 718, 732, it is stated:

“Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion ‘in any way or degree.’ ”

In *Robinson v. Lull* (U.S.D.C. Ill. 1956), 145 Fed. Supp. 134, 138, the Court quoted from *Doremus v. Hennessy* (1898), 176 Ill. 608, 614, 52 N.E. 924, 925, 54 N.E. 524, 43 L.R.A. 797 as follows:

“ ‘No persons, individually or by combination, have the right to directly or indirectly interfere or

disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require.' ”

It is also basic that plaintiff's right to work is included in the concept of liberty within the meaning of the 14th amendment of the Federal Constitution; and when that right is violated the courts will not hesitate to intervene and undo the mischief (*Parker v. Lester* [9th Cir. 1955], 227 F. 2d 708, 713-714).

Dent. v. State of West Virginia (1889), 129 U.S. 114 [9 S. Ct. 231], 32 L. Ed. 623, involved the validity of a state statute requiring that a practitioner of medicine obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the School of Medicine to which he belongs; or that he has practiced medicine in the state continuously for the period of 10 years prior to March 8, 1881. In discussing the rights of individuals to pursue their vocation, it was stated by Mr. Justice Field on page 121:

“It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republic institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the ‘estate’ acquired in

them—that is, the right to continue their prosecution,—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than the real or personal property can be thus taken."

Truax v. Raich (1915), 239 U.S. 33 [36 S. Ct. 7, 60 L. Ed. 131], involved the question whether the State of Arizona could limit the employment of aliens. Mr. Justice Hughes in delivering the opinion of the Court stated in regard to the question of the right to work on page 38:

"The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law."

and again on page 41:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was a purpose of the Amendment [Fourteenth Amendment] to secure. (Citations.) If this could be refused solely on the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In *Meyer v. State of Nebraska* (1923), 262 U.S. 390, [43 S. Ct. 625, 67 L. Ed. 1042], the appellant was convicted under an information which charged him with unlawfully teaching the subject of reading in the German language to a child under 10 years of age who had not attained and successfully passed the 8th grade.

In reversing and discussing the rights and freedom under the Fourteenth Amendment:

“No state . . . shall deprive any person of life, liberty or property without due process of law”,

Mr. Justice McReynolds in the opinion for the court stated on page 399:

“While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire a useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (citations).”

Terrace v. Thompson (1923), 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255, although affirming the alien property laws then in existence, also stated that the Fourteenth Amendment protected an alien of Japanese descent in his right to earn a livelihood by following the ordinary occupations of life, relying upon *Truax v. Raich* and *Meyer v. State of Nebraska*.

And in *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377, it was again iterated that the right to hold specific private employment and follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concept of the Fifth Amendment.

The allegations of unlawful conduct on the part of the defendants is a direct interference with plaintiff's right to earn a livelihood for himself and his family as guaranteed to him by the privileges and immunities portion of the Fourteenth Amendment. The fact that this is done to a corporation owned and controlled by him and through which he earns his livelihood, rather than to him directly, is of no matter. Language to that effect appears in *Royal News Company v. Schultz* (U.S.D.C., Michigan, 1964), 230 F. Supp. 641, 643 where plaintiff sought an injunction under the Civil Rights Act. (Injunction modified, *Royal News v. Schultz*, 6th Cir., 1965), 350 F. 2d 302.)

“Since the effect of such seizures and criminal prosecutions would be to deprive the plaintiff of business and its employees and agents of livelihood in contravention of their constitutionally protected rights, the court indicated during that hearing that it was inclined to issue an injunction to prevent the abuse of these rights.”

C. Regarding the Allegations in the Amended Complaint.

Moreover, it should not be overlooked that the amended complaint contains many allegations of overt acts of injuries done directly to the plaintiff, rather than through his corporation. For example, paragraph VIII of the amended complaint alleges that the defendants communicated with the customers of the plaintiff [Amended Complaint, Par. VIII(a), Tr. p. 4], and Paragraph VIII(c) [Tr. p. 4] alleges that the criminal complaints were filed against the plaintiff and not against the corporation (*Erlich v. Municipal Court* (1961,) 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334).

Since in a motion to dismiss for failure to state a claim all of the allegations contained in the complaint are taken as true (*Cooper v. Pate* (1964), 378 U.S. 546 (84 S. Ct. 1733, 12 L. Ed. 2d 1030), it was of course error for the trial court to determine as a matter of law that these allegations were not correct and that the injury was done to the corporation and not to the plaintiff directly.

POINT III.

Regarding Pleading Conclusions of Law in the Amended Complaint.

The trial court held that the allegations of unlawful combination and conspiracy alleged in Paragraph VIII of the amended complaint were conclusions of law unsupported by any proper and sufficient allegations of fact [Tr. p. 36].

The essential elements required in a complaint brought under the Civil Rights Act are set forth in *Lucero v. Donovan* (9th Cir., 1965), 354 F. 2d 16, where the court stated on pages 19-20:

“Generally expressed, ‘The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution of the United States’ (citation.) Here, it cannot be denied that defendants were acting under ‘color of state law.’ The issue is whether there was ‘deprivation of rights, privileges or immunities, secured by the Constitution (or laws) of the United States.’ ”

It is respectfully submitted that Paragraph VIII of the amended complaint contains all these elements [Tr. pp. 4-6]. Alleged in Paragraph VIII are 9 overt acts committed by the defendants to injure the plaintiff. This is sufficient to advise defendants of the nature of plaintiff's claim and if they seek particulars the means is by way of discovery. But as it stands, plaintiff's amended complaint spells out a good cause of action for violation of the Federal Civil Rights Act.

In any event, pleading conclusions of law is insufficient reason to dismiss the amended complaint without leave to amend (*Conly v. Gibson* (1957), 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80).

POINT IV.

Conclusion.

For all of the above reasons the judgment should be reversed and the cause remanded to the District Court with instructions to overrule the motion to dismiss and give defendants an opportunity to answer.

Respectfully submitted,

JOSEPH W. FAIRFIELD and
ETHELYN F. BLACK,
Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JOSEPH W. FAIRFIELD.

APPENDIX.

The pertinent portions of the statutes referred to in Appellant's Opening Brief are as follows:

Item 1. (Page 1) United States Code Annotated, Title 42 §1983:

"Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Item 2. (Page 1) United States Code Annotated, Title 28, §1343, subds. 1, 2, 3 and 4:

"§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights."

Item 3. (Pages 2, 4, 16) California Penal Code §383b.
(Note, Penal Code §383 referred to on page 17 should be section 383b.)

"§383b. Kosher meats and meat preparations; sale and labeling regulations; false representations; punishment; kosher defined.

Every person who with intent to defraud, sells or exposes for sale any meat or meat preparations, and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and from a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product, or the contents of any package or container, to be so constituted and prepared, by having or permitting to be inscribed thereon the words 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs in all display advertising in block

letters at least four inches in height 'kosher and nonkosher meats sold here'; or who exposes for sale in any show window or place of business as both kosher and nonkosher meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height, reading 'kosher meat' or 'nonkosher meat' as the case may be; or sells or exposes for sale in any restaurant or any other place where food products are sold for consumption on the premises, any article of food or food preparations and falsely represents the same to be kosher, or as having been prepared in accordance with the orthodox Hebrew religious requirements; or sells or exposes for sale in such restaurant, or such other place, both kosher and nonkosher food or food preparations for consumption on the premises, not prepared in accordance with the Jewish ritual, or not sanctioned by the Hebrew orthodox religious requirements, and who fails to display on his window signs in all display advertising, in block letters at least four inches in height 'kosher and nonkosher food served here' is guilty of a misdemeanor and upon conviction thereof be punishable by a fine of not less than fifty dollars, nor more than three hundred dollars, or imprisonment in the county jail of not less than thirty days, nor more than ninety days, or both such fine and imprisonment.

The word 'kosher' is here defined to mean a strict compliance with every Jewish law and custom pertaining and relating to the killing of the

animal or fowl from which the meat is taken or extracted, the dressing, treatment and preparation thereof for human consumption, and the manufacture, production, treatment and preparation of such other food or foods in connection therewith Jewish laws and customs obtain and to the use of tools, implements, vessels, utensils, dishes and containers that are used in connection with the killing of such animals and fowls and the dressing, preparation, production, manufacture and treatment of such meats and other products, foods and food stuffs. (Added Stats. 1931, c. 1029, p. 2147, §1.)"

Item 4. (Page 14) United States Constitution, Fifth Amendment:

"No person shall . . ., nor be deprived of life, liberty, or property, without due process of law;
 . . ."

Item 5. (Pages 5, 6, 7, 11, 12) United States Constitution, Fourteenth Amendment, §1.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Item 6. (Page 16) United States Code Annotated, Title 18, §241:

Conspiracy against rights of citizens

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise and enjoyment of any right or privilege

secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .

“They shall be fined . . .”

Item 7. (Page 16) United States Code Annotated, Title 18, §1951:

Interference with commerce by threats or violence

“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, . . .

(2) The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term ‘commerce’ means . . . all commerce between any point in a State . . . and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.”

Item 8. (Page) United States Code Annotated, Title 42, § 1985(3):

“Conspiracy to Interfere with civil rights

Depriving of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the

laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizens of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.”